

1. 1502228 (Migration) [2015] AATA 3107 (16 July 2015)
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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Harwinder Singh
CASE NUMBER:	1502228
DIBP REFERENCE(S):	BCC2012/993687
MEMBER:	Filip Gelev
DATE:	16 July 2015
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Skilled (Provisional) (Class VC) visa.

Statement made on 16 July 2015 at 6:14pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 4 February 2015 to refuse to grant the applicant a Skilled (Provisional) (Class VC) visa under s.65 of the *Migration Act 1958* (the Act).
7. The applicant applied for the visa on 14 September 2012. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.485.224 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because that the applicant did not satisfy the requirements of cl.485.224 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because he did not meet the requirements of Public Interest Criterion PIC 4020(1).
8. The applicant appeared before the Tribunal on 16 June 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
9. The applicant was represented in relation to the review by his registered migration agent.
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in this review is whether the visa applicant meets PIC 4020 as required by cl.485.224 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
12. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

13. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Batra v MIAC* [2013] FCA 274.
14. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
15. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
16. The Department refused this application on the basis that the applicant does not meet PIC 4020(1).
17. The applicant claimed to have undertaken an International English Language Testing System (IELTS) test results in June 2012. The results of the test were cancelled and are now '0.0' because the test provided conducted an investigation and found evidence that an impostor had taken the test. There is no evidence before the Tribunal that the applicant ever submitted the results of the test undertaken in June 2012 to the Department of Immigration or to the Tribunal. The applicant claimed to have undertaken another IELTS test in September 2012. The results of that test, to the best of the Tribunal's knowledge, have never been cancelled.
18. In the present case, the delegate referred to the departmental decision in relation to an application for a visa subclass 187 lodged by the applicant on 24 April 2013. The Tribunal (case 1420788, 24 June 2015), affirmed the decision of the delegate that the applicant does not meet cl. 4020(1) and therefore does not meet cl. 187.213.
19. The Tribunal in case 1420788 and the delegate reached the same conclusion, but in relation to different documents. The delegate's decision did not expressly identify whether the applicant had provided a bogus document or false or misleading information in a material particular. It appears that the delegate formed the view that the IELTS Test Report Form (TRF) was a bogus document because the applicant had failed to mention that he had undertaken IELTS tests previously including in June 2012. On review the Tribunal was specific in its finding that the applicant had provided a bogus document (within the definition of s.5(1)(a) or (c)) in relation to the June 2012 test, namely, a Temporary Admit Ticket to the IELTS test centre.
20. The applicant did not provide a copy of the Temporary Admit Ticket in relation to the present application to the Minister, an officer or the Tribunal.

21. The Tribunal respectfully disagrees with the delegate and finds that, even though the evidentiary threshold is low, it is not satisfied there is sufficient probative evidence to find that the September 2012 TRF was a bogus document.
22. Therefore, the applicant meets cl.4020(1).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(1)?

23. Clause 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy cl.4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2AA).
24. In this case, on the material before it, the Tribunal considers that it is open to it to make findings in respect of the first named visa applicant's ability to meet PIC 4020(2), rather than PIC 4020(1).
25. The Tribunal is empowered to determine an application by reference to a specified criterion which has not been addressed by the primary decision maker. If the Tribunal is not satisfied that a criterion is met, and it is a necessary prerequisite for the grant of a visa, then the Tribunal will sufficiently exercise its jurisdiction by affirming the delegate's decision on that basis: *Hui v Minister for Immigration and Citizenship* [2011] FMCA 486; *Jin v Minister for Immigration and Citizenship* [2009] FMCA 540.
26. The visa applicant was refused a visa subclass 187 on 16 December 2014 on the basis of PIC 4020(1). The applicant was not under the age of 18 at the time. As already noted, the Tribunal affirmed that decision on 24 June 2015.
27. When asked to present arguments in relation to PIC 4020(2), the applicant said that he never provided a bogus document to the Department of Immigration. He did not wish to add anything further to what he had said at the hearing in case 1420788.
28. Therefore, cl.4020(2) is not met.

SHOULD THE REQUIREMENTS OF CL. 4020(2) BE WAIVED?

29. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
30. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
31. At the hearing in case 1420788, the applicant said that he works full time in Australia, in a skilled occupation, and if he were to stop, that would affect the interests of Australia. He said that he has been working at Coventry's Seafood Bar and Grill in Morley since April 2015. The restaurant where he had worked since 2010, and which he named in the application for this visa, Zing Café and Restaurant, closed down. At the hearing in this matter, he said that not being able to get a visa would not affect Australia much, but he is a skilled person whom Australia will lose.

32. The Tribunal is not satisfied that the fact that the applicant has lived in Australia for about 6 years, studied, worked and paid taxes, and that he currently works full time in his field – cookery – constitutes compelling circumstances that affect the interests of Australia.
33. In relation to compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, he said that he had nothing to say. There is very little evidence before the Tribunal of any such compassionate or compelling circumstances.
34. Therefore the requirements of cl.4020(2) should not be waived.

DECISION

35. The Tribunal affirms the decision not to grant the applicant a Skilled (Provisional) (Class VC) visa.

Filip Gelev
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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